STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

JAMES MARSHALL REDWOOD,

Defendant-Appellant.

UNPUBLISHED
September 23, 2003

No. 238120
Saginaw Circuit Court
LC No. 00-019407-FC

Before: Sawyer, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Defendant was convicted, following a jury trial, of armed robbery, MCL 750.529, carjacking, MCL 750.529a, kidnapping, MCL 750.349, two counts of extortion, MCL 750.213, first-degree criminal sexual conduct ("CSC I"), MCL 750.520b, felonious assault, MCL 750.82, and carrying a dangerous weapon with unlawful intent ("CDW"), MCL 750.226. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 60 to 110 years each for the robbery, carjacking, kidnapping, and CSC I convictions, twelve to twenty-five years for each of the extortion convictions, and five to fifteen years each for the felonious assault and CDW convictions. He appeals as of right. We affirm.

I

According to the prosecution's theory of the case, defendant was living with one of the complainants, Michael Newman, when, on November 14, 2000, defendant became enraged when Newman refused to drive him to the bus station. Defendant allegedly held a knife to Newman's throat and demanded money from him. He then forced Newman's caretaker,[1] Paul Hammer, to leave with him in Newman's van by threatening Newman with the knife. After initially heading toward Saginaw, defendant changed his mind and proceeded to the residence of his estranged wife, Christine Redwood, who recently had revealed to defendant her intent to return to her ex-husband, Michael Larkin. Along the way, defendant allegedly forced Hammer to perform errands for him. When the two arrived at Redwood's residence, defendant again used the knife to force Redwood to accompany both him and Hammer to a motel in Clio, where defendant gave

[1] Newman was quadriplegic.

Hammer money to obtain a room. Defendant and the others then went into the room where they smoked crack cocaine. At that point, defendant allowed Hammer to leave, after again threatening him. Hammer thereafter drove the van back to Newman's residence and called the police. After Hammer left, defendant allegedly forced Redwood to have sexual intercourse with him and perform other nonconsensual sexual acts. The police subsequently arrived at the motel and apprehended defendant. Defendant maintained that he only took money from Newman that was owed to him because he had previously paid Newman's outstanding crack cocaine debt. Defendant also claimed that Redwood and Hammer accompanied him freely, because they wanted to smoke crack cocaine.

II

Defendant first argues that the prosecution failed to present sufficient evidence to prove the offense of carjacking beyond a reasonable doubt. Specifically, he maintains that the prosecution failed to show that Newman's van was obtained in Newman's "presence" because Newman was confined to his bed when it was taken. Additionally, he asserts that the van was not obtained by force. We disagree.

To prove carjacking, the prosecution must establish: (1) that the defendant took a motor vehicle from another person; (2) that the defendant did so in the presence of that person, a passenger, or any other person in lawful possession of the motor vehicle; and (3) that the defendant did so either by force or violence, by threat of force or violence, or by putting another person in fear. MCL 750.529a; *People v Green*, 228 Mich App 684, 694; 580 NW2d 444 (1998). An automobile is in the "presence" of another when it is shown that the automobile "is within his reach, inspection, observation or control, that he could, if not overcome by violence or prevented by fear, retain his possession of it." *People v Raper*, 222 Mich App 475, 482; 563 NW2d 709 (1997) (citations omitted). Thus, "whether the taking of a motor vehicle occurs within the presence of a person depends on the effect of violence or fear on that person's ability to control his possession of the motor vehicle at the time of its taking." *Green*, *supra* at 695.

Under this definition, there was sufficient evidence to enable the jury to find beyond a reasonable doubt that Newman's van was taken in Newman's presence, notwithstanding that Newman was disabled and in bed when defendant accosted him. Newman was the owner of the van, which had been modified to allow him to drive it. At the time defendant threatened Newman with a knife, Newman had possession of the keys and, therefore, was in control of the vehicle. *Raper*, *supra* at 482-483. The jury could properly conclude that defendant obtained control and possession of the van in Newman's presence by threatening Newman with a knife and causing him to surrender the keys. See *Raper*, *supra* ("presence" found where the defendant took keys from the owner's body after killing him some two hundred yards from the automobile).

Defendant also argues that the prosecution failed to prove the element of force because Newman was incapable of stopping defendant even if defendant had chosen to take the van without any force. This argument is without merit. Although the theft could have been accomplished in an alternate manner, Newman's account of the taking was sufficient to enable the jury to find beyond a reasonable doubt that defendant obtained the van through the use of force.

Accordingly, sufficient evidence was presented to support defendant's carjacking conviction.

III

Defendant also argues that he was denied a fair trial because of misconduct by the prosecutor. We disagree.

Defendant failed to preserve this issue with an appropriate objection to the alleged misconduct at trial. Therefore, we review this issue for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant first argues that the prosecutor improperly elicited evidence that he smoked crack cocaine and trespassed at Kelly Duncan's residence on the evening before the charged crimes. Although defendant asserts that this evidence was inadmissible under MRE 404(b), he refers only to the prosecutor's opening statement and does not direct his discussion at any testimony or other evidence offered at trial. Furthermore, apart from asserting that such evidence was inadmissible under MRE 404(b), he provides no analysis of the substantive requirements for the admission or exclusion of evidence under this rule, nor does he attempt to explain how this apparent evidentiary issue constitutes misconduct, given that misconduct generally may not be based upon a prosecutor's good-faith effort to admit evidence. *People v Noble*, 238 Mich App 647, 660; 608 NW2d 123 (1999). Under the circumstances, we deem this issue abandoned. *Prince v MacDonald*, 237 Mich App 186, 197; 602 NW2d 834 (1999); *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998); *People v Canter*, 197 Mich App 550, 565; 496 NW2d 336 (1992).

We similarly conclude that defendant has abandoned his related claim of error concerning the relevance of information about Duncan's and Redwood's fear of defendant, and the fact that Redwood told Larkin that she planned to meet with defendant on the morning of the assaults and to call the police if he did not hear from her later that morning.

Even if defendant had not abandoned these claims, we would find them to be without merit. Defendant opened the door to the issue of his cocaine usage through his chosen defense, wherein he claimed that Redwood and Hammer voluntarily accompanied him in order to smoke crack cocaine. *People v Allen*, 201 Mich App 98, 103; 505 NW2d 869 (1993). Moreover, the testimony about defendant's actions on the evening immediately before the assaults, and the reactions of Redwood and others, was probative of Redwood's state of mind the following day and whether she consented to the charged sexual acts with defendant. Defendant has not shown plain error with regard to this evidence. MRE 404(b); MRE 403; *People v VanderVliet*, 444 Mich 52, 74; 508 NW2d 114 (1993), mod 445 Mich 1205 (1994); *People v Aldrich*, 246 Mich App 101, 114; 631 NW2d 67 (2001).

Defendant also argues that the prosecutor introduced irrelevant evidence of his employment history and financial status. Although evidence of chronic financial hardship, without more, is generally inadmissible to establish motive, *People v Henderson*, 408 Mich 56, 62-63, 66; 289 NW2d 376 (1980), the evidence here was relevant to rebut defendant's defense that he took Newman's money under a claim of right because he had previously paid Newman's

prior cocaine debt and Newman refused to repay him. *VanderVliet*, *supra* at 60 n 8. Plain error has not been shown.

Defendant also argues that the prosecutor improperly denigrated defense counsel when he responded to counsel's characterization of prosecution witnesses as "crackheads" with commentary that defense counsel was inappropriately attempting to demean the witnesses so the jury would find them not worthy of protection. Considered in context, the prosecutor was arguing that the jury should decide the case on the basis that the witnesses were credible, notwithstanding their status. The prosecutor's responsive remarks did not constitute plain error.

Because defendant has failed to demonstrate a single error based on the prosecutor's conduct, his claim that the cumulative effect of the prosecutor's misconduct denied him a fair trial is similarly rejected. *People v Cooper*, 236 Mich App 643, 660; 601 NW2d 409 (1999).

Lastly, defendant's mere assertion that counsel was ineffective for not objecting to the matters discussed above is insufficient to properly present this issue for our review and, accordingly, we consider it abandoned. *Kelly*, *supra* at 640-641.

IV

Defendant next argues that his habitualized sentences of 60 to 110 years for his robbery, carjacking, kidnapping, and CSC I convictions are disproportionate, and also invalid because, given his age of forty-six, he will not reasonably be able to serve the minimum terms. We find no merit to these arguments.

Defendant was sentenced under the legislative sentencing guidelines, which apply to crimes committed after January 1, 1999. MCL 769.34(2); *People v Greaux*, 461 Mich 339, 342 n 5; 604 NW2d 327 (2000). MCL 769.34(10) provides, in pertinent part:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.

Defendant does not dispute that he was sentenced within the recommended range of the sentencing guidelines. Further, he does not allege a scoring err, or assert that his sentences were based on inaccurate information. Accordingly, we must affirm defendant's sentences. MCL 769.34(10).

Because defendant's sentences are within the sentencing guidelines recommended range, they are not subject to review for proportionality. *People v Babcock*, ___ Mich ___; 666 NW2d 231 (2003). Defendant's reliance on *People v Moore*, 432 Mich 311; 439 NW2d 684 (1989), for the proposition that resentencing is required because he has no reasonable prospect of serving his minimum sentences is misplaced, as the holding in *Moore* has been overruled. See *People v Lemons*, 454 Mich 234, 257; 562 NW2d 447 (1997); *People v Phillips (After Second Remand)*, 227 Mich App 28, 31 n 2; 575 NW2d 784 (1997); *People v Kelly*, 213 Mich App 8, 15-16; 539 NW2d 538 (1995).

Defendant further argues that, insofar that MCL 769.34(10) precludes review of his sentences, it is unconstitutional. Because defendant did not challenge the constitutionality of MCL 769.34(10) below, this issue is not preserved. Therefore, appellate relief is not warranted unless defendant can show a plain error affecting his substantial rights. *Carines*, *supra* at 763.

The constitutionality of a statute is a question of law that we review de novo. *People v Jensen (On Remand)*, 231 Mich App 439, 444; 586 NW2d 748 (1998). A statute is accorded a strong presumption of validity and this Court has a duty to construe it as valid absent a clear showing of unconstitutionality. *Id*.

Defendant first argues that MCL 769.34(10) is unconstitutional because it violates the right to an appeal as granted by Const 1963, art 1, § 20. We disagree. MCL 769.34(10) does not abolish a defendant's right to appeal, but rather only limits the right to challenge the length of a sentence within the properly scored guidelines range. Further, the statute expressly permits a defendant to challenge on appeal the scoring of the sentencing guidelines or the accuracy of information relied upon in determining a sentence. We hold that defendant has not established a plain violation of Const 1963, art 1, § 20.

We likewise reject defendant's claim that MCL 769.34(10) unconstitutionally violates the separation of powers doctrine because it usurps a court's discretion to make decisions concerning sentencing. See Const 1963, art 3, § 2. As both our Supreme Court and this Court have observed, however, the constitution vests in the Legislature the ultimate authority to provide for penalties for criminal offenses. Const 1963, art 4, § 45; *People v Hegwood*, 465 Mich 432, 436; 636 NW2d 127 (2001); *People v Babcock*, 244 Mich App 64, 68, 71; 624 NW2d 479 (2000). Although the authority to administer the sentencing statutes enacted by the Legislature lies with the judiciary, it must do so only within the limits set by the Legislature. *Hegwood*, *supra* at 436-437. As discussed in *People v Conat*, 238 Mich App 134, 146-153; 605 NW2d 49 (1999), this power includes the authority to impose restrictions on the trial court's exercise of discretion in imposing sentences. Here, the Legislature has decided to assert its authority over the sentencing process through the enactment of the legislative sentencing guidelines. Because the Michigan Constitution grants the Legislature the authority to establish the sentencing scheme for criminal offenses, MCL 769.34(10) does not infringe on the judiciary's authority and, accordingly, does not violate Const 1963, art 3, § 2.[2]

We similarly find no substantive or procedural due process violation in light of our above analysis. We therefore reject defendant's claim that MCL 769.34(10) is unconstitutional.

V

[2] Defendant reiterates these arguments by claiming that MCL 769.34(10) is unconstitutional because it takes away a "vested right" to appeal and to have the judiciary determine his case rather than the Legislature. However, there is no vested right in an existing law or defense, *Ramsey v MUSTFA Policy Bd*, 210 Mich App 267, 270; 533 NW2d 4 (1995), or a particular procedure or remedy, *Detroit v Walker*, 445 Mich 682, 699-670; 520 NW2d 135 (1994). Therefore, defendant's vested rights have not been violated by a sentence within the recommended range of the legislative guidelines. *Id*.; *Ramsey*, *supra* at 270.

Defendant next argues that the trial court erroneously refused to dismiss the extortion charges as being violative of the prohibition against double jeopardy. We disagree.

When this issue initially arose at trial, the court indicated that it was going to submit all charges to the jury, but that defendant could renew his motion after the verdict, at which time the court could decide whether defendant's double jeopardy protections were violated.[3] Because defendant never renewed his motion after the verdict, we conclude that this issue is not preserved. See *People v Schmitz*, 231 Mich App 521, 527-528; 586 NW2d 766 (1998). Accordingly, we review this issue to determine whether defendant has established a plain error affecting his substantial rights. *Carines, supra* at 763.

The double jeopardy clauses of the United States and Michigan constitutions prohibit courts from imposing multiple punishments for the same offense. US Const, Am V; Const 1963, art 1, § 15; *People v Rodriguez*, 251 Mich App 10, 16-17; 650 NW2d 96 (2002). When a trial court sentences a defendant for violating multiple statutes with a single act, we must decide whether the Legislature intended separate punishments for each offense. See *People v Denio*, 454 Mich 691, 706-707; 564 NW2d 13 (1997), citing *Rutledge v United States*, 517 US 292, 297; 116 S Ct 1241; 134 L Ed 2d 419 (1996).

In the instant case, we are not persuaded that defendant has established a plain violation of his double jeopardy protections. First, although defendant argued below that he could not properly be convicted of both extortion and kidnapping because the two offenses were based on the same conduct, at trial he was not convicted of kidnapping with respect to Hammer.[4] Thus, defendant cannot demonstrate that he was convicted of both a greater and lesser offense for the same conduct and, accordingly, his double jeopardy argument must fail.

Likewise, defendant was charged with four separate counts of CSC I, each properly predicated on a separate act of penetration. *People v Wilson*, 196 Mich App 604, 608; 493 NW2d 471 (1992). However, defendant was convicted of only a single count of CSC I. Under the circumstances, because defendant's additional extortion conviction could fairly be predicated on a forced act of sexual penetration that was not the basis for the CSC I conviction, we are not persuaded that a double jeopardy violation has been shown. There is no violation of double jeopardy protections if one crime is complete before the other takes place, notwithstanding that the offenses may share common elements. *People v Lugo*, 214 Mich App 699, 708; 542 NW2d 921 (1995).

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[3] The normal remedy where a defendant is convicted of multiple offenses in violation of double jeopardy protections is to vacate the lower conviction. *People v Herron*, 464 Mich 593, 609; 628 NW2d 528 (2001).

[4] In other words, the jury acquitted defendant on the charge of kidnapping Hammer; defendant's kidnapping conviction is with respect to Redwood.

Affirmed.

/s/ David H. Sawyer
/s/ Joel P. Hoekstra
/s/ Christopher M. Murray